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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERARDO CHRIS CANDELARIA, Defendant and Appellant.	E056844 (Super.Ct.No. SWF1200351) O P I N I O N

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Anthony DaSilva and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Gerardo Chris Candelaria of two counts of misdemeanor battery and one count of corporal injury on a spouse. On appeal, he contends the court erred by denying his request for the appointment of substitute counsel and by imposing a booking fee without finding whether he had the ability to pay the fee and without any evidence of the actual administrative costs of booking. We conclude the court did not err in denying defendant's request for substitute counsel and that he has forfeited his arguments regarding the booking fee. Accordingly, we affirm the judgment.

I. FACTUAL AND PROCEDURAL SUMMARY

The convictions in this case arose from three incidents involving defendant and his wife, Jane Doe. The first occurred on September 3, 2011. During an argument, defendant slapped Doe four times in her face using both hands, called her a prostitute, pushed her to the floor, and threatened to make her "chug" her heart medication pills.

The second incident took place on October 17, 2011. Defendant questioned Doe about e-mails and her former boyfriend. He accused Doe of lying to him and slapped her four times, which caused her mouth to bleed. He also punched Doe in her ribs, chased her through the house, and hit her in her eye with a sock.

The third incident occurred on October 31, 2011. That time, Doe was in bed holding her 14-month-old son to help him get to sleep. Defendant laid next to Doe and punched her several times in her back with a closed fist. After defendant fell asleep, she left their apartment. She lived with her sister for a short time before moving to a domestic violence shelter.

Defendant was charged in counts 1 and 2 with corporal injury on a spouse under Penal Code section 273.5, subdivision (a). These counts were based on the October 31, 2011 incident and the October 17, 2011 incident, respectively. In count 3, defendant was charged with misdemeanor battery under Penal Code section 243, subdivision (e)(1), based upon the September 3, 2011 incident.[1]

Counsel was appointed for defendant. Prior to trial, defendant requested the appointment of substitute counsel. The court conducted a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and denied the request.

Following trial, defendant was convicted as charged under counts 2 and 3, and, as to count 1, found guilty of the lesser offense of misdemeanor battery.

After defendant refused to accept the terms of probation, the court sentenced him to two years in prison. The court also imposed certain fees and fines, including a booking fee of $450.34 pursuant to Government Code section 29550.

II. ANALYSIS

A. *Marsden Motion*

Defendant contends the court erred in denying his request for the appointment of substitute counsel. We reject this argument.

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[1] A fourth count, in which defendant was accused of child endangerment under Penal Code section 273a, subdivision (b), was also alleged. Defendant was acquitted of this charge.

1. Background Principles and Standard of Review

An indigent criminal defendant is entitled to competent representation; if the defendant cannot afford to hire an attorney, one must be appointed for him or her. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 343-345; *Marsden, supra*, 2 Cal.3d at p. 123; *People v. Crandell* (1988) 46 Cal.3d 833, 853.) Although there is generally no right to more than one appointed attorney, a defendant may request that his or her appointed counsel be discharged and substitute counsel appointed. (*Marsden, supra*, at p. 123.) The request is known as a *Marsden* motion. (*People v. Smith* (1993) 6 Cal.4th 684, 690.)

The rules regarding *Marsden* motions are well-settled. "'When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden, supra,* 2 Cal.3d 118, "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."' [Citation.] 'A trial court should grant a defendant's *Marsden* motion only when the defendant has made "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation."' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 230.)

"'We review the denial of a *Marsden* motion for abuse of discretion.' [Citation.] 'Denial is not an abuse of discretion "unless the defendant has shown that a failure to

replace counsel would substantially impair the defendant's right to assistance of counsel."' [Citation.]" (*People v. Streeter, supra,* 54 Cal.4th at p. 230.)

2. Facts Regarding Defendant's *Marsden* Motion

Defendant was arraigned and appointed counsel on February 8, 2012. On May 9, 2012, the date set for trial, defendant indicated he wanted new counsel. The court commenced a hearing pursuant to *Marsden* and asked defendant why he wanted his attorney off the case. Defendant responded: "I feel that I'm not being represented well, as I should be." When the court asked for "the details," defendant said: "I asked for certain things. Like since I've been here, I've been asking, like, information about what's going on with my son. I've been asking for him to relay information to my family members. And I've just been sitting here for five months. And I feel like nothing hasn't been done at all, so I wanted to change it up."

After some further colloquy, the court said: "So far the big complaint that you have articulated to me is that you wanted [counsel] to get you updated information or relay some information related to your son, and you wanted him to communicate to your family." Defendant said: "[T]hat's correct."

When the court informed defendant that counsel's failing to act as "the go-between between you and your family" was not a basis to have counsel removed, defendant said: "[Counsel] said he was going to visit me before my next court visit. That never happened. So that's lying to me." Defendant added that his attorney has visited him "[j]ust once," and that "we haven't gotten nowhere. We haven't gone over my case

at all. We haven't talked anything about it. I've just come in every time in here and then come back. I just get court dates. That's all I get. I haven't gone over one thing over my case. I've already been here for five months." The court confirmed this complaint by asking: "So there has been, in your mind, not sufficient communication between you and [counsel]?" Defendant replied: "Yes, sir."

The court asked counsel to respond. Counsel stated:

"I'll address the first one regarding his family members, even though it's probably not relevant. He did ask me to contact his mother to try to find out what's going on with his son. I did try to contact her via the number he gave me. No one picked up at the time. I don't believe I left a message.

"In regards to doing anything on his case, I've been in contact with [the prosecutor]. I've received investigation reports from her investigator. I've told and read these investigation reports to [defendant].

"On March 5th I visited [defendant]. According to my notes, I discussed his case with him. I provided him copies of the police reports and the [district attorney's] investigator's reports. I explained the preliminary hearing process before we went to prelim.

"After he was held to answer on the 6th, I talked to him about maybe possibly making an offer. He chose not to. I've never conveyed an offer to the [district attorney] on this case. The offer the [district attorney] conveyed to me in this case was low term, two years.

"My client has always been on a stance that he has not committed this particular crime that he is charged with.

"In regards to seeing [defendant] before today's date, I may have told him that. If I didn't see him after telling him that, I apologize. I either forgot I said that or I just got too busy in my last trial . . . or preparing for my next trial tomorrow. I don't have the best recollection sometimes.

"In regards to his case, it's fairly simple. I have told him this over and over again. It's his word versus her word. There is no real physical evidence of him allegedly hitting the mother of his child. She describes prior incidents.

"There may be [Evidence Code section] 1108 evidence, but it depends on the [Evidence Code section] 402 motions. He said he did not want to waive time. We have not waived time. I've announced ready for trial. It's not a very complicated case, your Honor."

The court asked defendant if he had anything else to add. Defendant said: "See how he is talking right now? I ask him about my case. How is my case going? Well, it's your word versus hers, and she is the one crying. That's all I get every time I ask how my case is looking. So every time he makes it sound like it's going to be like okay, and I'm going to get out. [¶] But, yet, I feel like the world is dropping on me. I'm hearing the reason I'm here. And I'm not trying to hear no offers, because I'm not guilty. And, you know, I'm trying to get out. If I was guilty, I was—it's no fun in here. . . ."

The court then asked defendant if his attorney has told him "that everything is going to be okay and [he was] going to get out?" Defendant responded: "He hasn't told me anything. He just tells me, it's your word versus hers, and she is the one crying."

Counsel responded by explaining that defendant's wife was very emotional and cried during her testimony at the preliminary hearing. He said he told defendant "that the jury is going to see that. They are going to base her credibility on how she presents. They are going to base his credibility on how he presents."

The court told counsel: "Perhaps, [counsel], your client is a very concrete thinker. I'm not telling you what you should say to him about the strengths and weaknesses of the case. But 'he said versus she said' perhaps isn't completely getting through. [¶] . . . [¶] . . . I'm not trying to tell you how to do your business. But it's apparent in this communication and dialogue we are having that what is obvious to you and what may be obvious to me may not be obvious to [defendant]."

The court then denied defendant's request for new counsel, stating: "I've heard what [defendant] had to say. I heard the preliminary hearing. I saw the work that [counsel] did during the course of the preliminary hearing. I've heard about the work that he has done in preparing your case. [¶] I do not find that you have made a substantial showing that [counsel] has done an inadequate job in representing you, nor do I find that the two of you are involved in an irreconcilable conflict such that it would result in ineffective representation."

The matter proceeded to trial. Defendant made no further request for substitute counsel.

3. Analysis

We find no error in the conduct of the *Marsden* hearing and no abuse of discretion in the court's conclusion. The record indicates the court provided defendant with the opportunity to explain why he wanted substitute counsel and prompted him to provide specific instances of inadequate performance, as *Marsden* requires. (See *People v. Taylor* (2010) 48 Cal.4th 574, 599.) For example, when defendant complained that he was not being represented well, the court asked him for the "details." Defendant explained that counsel was not providing him with information about his son or relaying information to his family. When defendant subsequently complained that he and counsel had not gone over his case, the court made specific inquiries—asking defendant whether counsel had visited him at all, whether counsel had gone over the details of his case, and whether counsel had conveyed any settlement offers. After asking for and receiving counsel's explanation, the court asked defendant if he had anything else he would like to add. Defendant responded by expressing frustration with counsel's view of the case that "it's your word versus hers." The record thus indicates that defendant had a full and fair opportunity to air his grievances.

The denial of the request was not an abuse of discretion. The first reason given by defendant—that counsel failed to act as a go-between vis-à-vis his family—is not, as the court stated, a basis for removing counsel. The second reason, that counsel did not visit

him as promised on one occasion, does not necessarily trigger a right to new counsel. (See *People v. Silva* (1988) 45 Cal.3d 604, 622 ["the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence"]; accord, *People v. Hart* (1999) 20 Cal.4th 546, 604.) Although defendant was frustrated with counsel's opinion that the case will come down to "your word versus hers," "a defendant's frustration with counsel [is] not sufficient cause for substitution of counsel." (*People v. Streeter, supra,* 54 Cal.4th at p. 231.) Moreover, the court, being familiar with the case and having heard the preliminary hearing, appeared to concur with counsel's view of the matter as a "'he said versus she said'" case. (See *People v. Taylor, supra,* 48 Cal. 4th at p. 600 ["court was entitled to credit counsel's explanations and to conclude that defendant's complaints were unfounded."].) In this light, it appears that defendant's frustration was not so much with counsel as it was with the nature of the case.[2]

The primary focus of defendant's argument on appeal is on counsel's statement that in failing to visit defendant on one occasion he either forgot he had told defendant he would visit him or was too busy to do so because he was in trial on another matter or preparing for his next trial. According to defendant, this indicates "a serious breakdown in communication resulting in mistrust," which "created 'an atmosphere of mistrust, misgivings and irreconcilable differences.'" These assertions appear to be overstated. It

[2] At trial, the prosecution presented the testimony of Doe, Doe's mother, Doe's brother, and Doe's brother's wife, among others. The defense presented no affirmative evidence.

appears from the record that the failure to visit as promised occurred once. Significantly, the failure to visit was raised by defendant at the *Marsden* hearing only after the court rejected his first reason for wanting a new attorney. Under the circumstances here, one missed appointment cannot reasonably be viewed as a "serious breakdown in communication" or an irreconcilable difference.

Even if the failure to visit caused defendant to mistrust his counsel, the "mere '"lack of trust in, or inability to get along with,"' counsel is not sufficient grounds for substitution. [Citation.]" (*People v. Taylor, supra,* 48 Cal. 4th at p. 600.) As our state Supreme Court recently stated: "'If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.' [Citations.]" (*People v. Myles* (2012) 53 Cal.4th 1181, 1207.) Any loss of trust that resulted from counsel's failure to visit defendant did not, we conclude, create an irreconcilable conflict or a risk of ineffective representation sufficient to warrant new counsel.

For the foregoing reasons, the court did not abuse its discretion in denying defendant's *Marsden* motion.

B. *Booking Fee*

At the sentencing hearing, the court imposed a "booking fee" in the amount of $450.34 pursuant to Government Code section 29550. Defendant did not object to the

fee or challenge it in any way. On appeal, defendant contends the court erred in imposing this fee without determining defendant's ability to pay the fee or the county's actual booking costs.

Government Code section 29550, subdivisions (c) and (d) provide:

"(c) Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons.

"(d) When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency:

"(1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt.

"(2) The court shall, as a condition of probation, order the convicted person, based on his or her ability to pay, to reimburse the county for the criminal justice administration fee, including applicable overhead costs."

Initially, we note that although the terms of Government Code section 29550 permits the imposition of a "criminal justice administration fee" when there is a "judgment of conviction," the statute requires a finding as to the defendant's ability to pay the fee only when the fee is imposed as a condition of probation. (Gov. Code, § 29550, subds. (c), (d)(2).) Here, because defendant refused to accept the terms of probation, he was not granted probation. The court, therefore, was not required to determine whether defendant had the ability to pay the fee.

Even if a finding as to defendant's ability to pay was required, defendant has forfeited the argument on appeal. As the parties acknowledged, the issue of whether a defendant forfeits a claim as to the propriety of a booking fee has been the subject of conflicting decisions among appellate courts. (Compare *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [claims are not forfeited], disapproved in *People v. McCullough* (2013) 56 Cal.4th 589, 599, with *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [challenge to booking fee waived for failure to raise in trial court].) After the briefs were filed in this case, our state Supreme Court decided the issue. In *McCullough*, the court held that "a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal . . . ." (*People v. McCullough, supra,* at p. 598.) The court explained that by "'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*Id.* at p. 597.) The court concluded:

"[W]e hold here that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*Ibid.*)

Although *McCullough* addressed the failure to challenge a booking fee imposed under Government Code section 29550.2, not the fee imposed in this case under Government Code section 29550, its rationale plainly applies to defendant's claims. (See *People v. Aguilar* (2013) 219 Cal.App.4th 1094, 1097 ["The reasoning of *McCullough* . . . applies to all the fees appellant claims were imposed without a finding of ability to pay."], fn. omitted.) By failing to raise any objection to the booking fee at the time it was imposed, defendant has forfeited his claims that the court failed to make a finding as to his ability to pay or that the evidence was insufficient to support the fee.[3]

[3] The People argue that, if defendant's argument regarding the lack of evidence as to the actual administrative costs has not been forfeited, it should be rejected on the merits. The People assert that the amount of the fee is set each year by the Riverside County Board of Supervisors based on the criteria set forth in Government Code section 29550. We are asked to take judicial notice of a Riverside County ordinance setting the amount of the booking fee at $450.34 and to presume that the court based the imposition of the booking fee on this ordinance. Because we conclude defendant has forfeited any fact-based challenge to the booking fee, we need not address these arguments and, therefore, deny the request for judicial notice.

III. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.